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NO.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1984

WILLIAM MCGAFFIN,
Petitioner,

vs.

CATHY ROBERTS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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QUESTION PRESENTED FOR REVIEW

WHAT IS THE MINIMUM CONSTITUTIONAL STANDARD WHICH MUST BE APPLIED IN A CUSTODY DISPUTE INVOLVING A NON-CUSTODIAL FATHER AND A MATERNAL GRANDMOTHER AFTER THE DEATH OF THE MINOR CHILD'S MOTHER WHILE THE FATHER WAS EXERCISING CONTINUOUS AND FREQUENT VISITATION, CONTRIBUTING TO THE SUPPORT OF THE CHILD, HAD A VIABLE PARENT-CHILD RELATIONSHIP AND WAS ADJUDICATED FIT BY THE TRIAL COURT.

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TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

William McGaffin, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Connecticut entered in the above entitled case on June 19, 1984.

OPINION BELOW

The opinion of the Supreme Court of the State of Connecticut is reported at 193 Conn. 393 and a Motion to Reargue which was denied by the Supreme Court of the State of Connecticut on July 2, 1984, which was unreported. Said decisions are printed in Appendix A attached hereto, infra Pages 10-32. The judgment of the trial court is printed in Appendix A attached hereto, infra Page 1. The journal entry of Judgment of the Judicial District in and for the County of Middlesex, State of Connecticut is printed in Appendix A attached hereto, infra Pages 2-9.

JURISDICTION

The judgment of the Supreme Court of the State of Connecticut (Appendix A, infra Page 11-32) was entered on June 19, 1984. A timely petition for rehearing was denied on July 2, 1984 (Appendix A, infra Page 25). The jurisdiction of the Supreme Court is invoked under 28 U.S.C.S. Sec. 2101 and Supreme Court Rule Sec. 22.

STATUTE INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and the Ninth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

The petitioner is the biological father of the minor child, Cathy McGaffin, who was the lawful issue of a marriage between William McGaffin and Lena McGaffin. The parents were lawfully divorced in the Judicial District of New Haven and, by agreement of the parties, custody was given to Lena McGaffin. The petitioner was granted visitation rights from Friday evening at 6:30 p.m. until Sunday evening at 6:30 p.m. The petitioner was ordered to pay support to the State of Connecticut for the support of the minor child.

The petitioner exercised his visitation regularly and had a strong and loving relationship with his daughter. The petitioner had filed a motion in the Superior Court in and for the Judicial District of New Haven at New Haven for the State of Connecticut to modify custody of the minor child.

On or about December 9, 1982 Lena McGaffin died unexpectedly in her apartment. Cathy Roberts is the maternal grandmother of Cathy McGaffin. Cathy Roberts took physical possession of the child and refused to return the child to the petitioner.

The petitioner obtained an ex parte order granting him temporary possession and custody of the child. Cathy Roberts refused to comply with the order of the court and the police department was unable to locate the child. The court vacated its custody order and transferred the petition to the Judicial District of Middlesex at Middletown for a hearing upon a Writ of Habeas

Corpus which had been personally served upon Cathy Roberts.

On the Petition for a Writ of Habeas Corpus, the trial court established that the petitioner was the biological father of Cathy McGaffin, that Lena McGaffin had died on or about December 9, 1982 and that the parental rights of the petitioner had never been terminated by any court in any jurisdiction.

The trial court also ruled that the petitioner had the duty to establish that he was a fit parent and that it would be in the child's best interest to be given to him. The court then found that the petitioner was a fit parent but that Cathy Roberts could better provide for the wants and needs of the child and awarded custody of said child to Cathy Roberts.

A timely appeal was filed from said ruling and the Supreme Court of the State of Connecticut held that under the applicable provisions of the Constitution of the United States the State of Connecticut could establish a rule of custody between a biological parent and a non-biological parent based solely on the best interests of the child without giving any preference to the biological parent. The Supreme Court of the State of Connecticut then upheld the ruling of the trial court by indicating that said trial court had correctly applied Connecticut law.

REASON FOR GRANTING WRIT

Many states are now applying different standards concerning the minimal constitutional protection which must be given to parental relationships which began with **Stanley v. Illinois**, 405 U.S. 645 (1972). The Connecticut

Supreme Court based its decision extensively upon federal law based upon the integrity of the family unit. See **McGaffin v. Roberts,** 193 Conn. 393, 400-401 (1984).

Most state courts which have dealt with this issue have held that the Constitution of the United States mandates that a preference be given to a biological parent in a dispute concerning the custody of a minor child. This case is directly at odds with a recent decision of the Utah Supreme Court in **Hutchison v. Hutchison,** 644 P.2d 38 (Utah, 1982). The Utah Supreme Court held that the Constitution of the United States required that there exists a presumption of parental fitness and if the petitioner could establish the existence of a parent-child relationship said presumption would prevail against even a better suited custodian.

This court has not previously addressed the issue of the minimal constitutional requirements involving a custody dispute between a biological parent and a non-parent. Supreme Court Rule Sec. 19(1) clearly indicates that this court will follow a criteria which includes rendering a uniform decision on important questions of federal law.

Given the mobility of our present society, the prevalence of divorce and the estrangement of parents and children; there is a strong need for this court to establish a minimal constitutional standard which must be applied in all cases involving custodial disputes between biological parents and third parties.

If this court were to allow this decision to stand, states would be free to circumvent the requirements of this court in **Stanley v.**

Illinois, supra, by allowing a third party to act in place of the State. If this decision were allowed to stand it would also undermine the recent ruling by this court in **Santosky v. Kramer**, 455 U.S. 745 (1982) which requires a State to establish proof for termination of parental rights by a clear and convincing standard of evidence.

The case at bar presents this court with a unique opportunity to clarify this important and constitutional question dealing with parental rights.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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BY:_____
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NO. 38744	:	SUPERIOR COURT
WILLIAM MCGAFFIN	:	J.D. OF MIDDLESEX
VS.	:	AT MIDDLETOWN
CATHY ROBERTS	:	JANUARY 26, 1984

JUDGMENT

This action, praying for a writ of habeas corpus for the custody of a minor child came to the Superior Court for the Judicial District of New Haven on the 20th day of December 1982 when the Court ordered that this matter be transferred to the Superior Court for the Judicial District of Middlesex and thence to the present time, when the parties appeared in the Superior Court for the Judicial District of Middlesex and were at issue to the court, as on file.

The Court, having heard the parties, finds the issues for the respondent.

Whereupon, it is adjudged that the care, custody and education of the minor child is hereby committed to the respondent subject to the right of visitation in the petitioner as follows: petitioner shall have visitation rights one day per week from 10:00 a.m. to 5:00 p.m., on alternating Saturdays and Sundays except that on the first weekend of each month visitation shall be from 10:00 a.m. Saturday to 5:00 p.m. on Sunday; visitation is to commence on Saturday, February 12, 1983.

s/s
Michael Kokoszka
Clerk

MEMORANDUM OF DECISION

This is a habeas corpus action brought by the plaintiff father to obtain custody of his 4 year old daughter. The facts are as follows: On December 9, 1982, Lena McGaffin, mother of 4 year old Cathy McGaffin and ex-wife of the plaintiff died suddenly after allegedly suffering a seizure. At the time of her death Lena McGaffin had custody of her minor daughter; she and the child were receiving State welfare assistance; the plaintiff was being investigated by the state for delinquent support payments; and a custody action was pending in the New Haven Judicial District brought by the plaintiff when visitation was withheld by the mother after she found bruises on the child following a weekend visit with the father.

Plaintiff and his deceased ex-wife separated in 1980 and were divorced in 1981 with plaintiff marrying the present Mrs. McGaffin shortly thereafter. Custody was not contested at that time, the parents agreeing the mother would have custody. Plaintiff has been under a $25.00 per week support order.

The minor child, Cathy, was born on January 7, 1978. Plaintiff and the child's mother came up from Virginia that year and moved into the home of the maternal grandmother, Cathy Roberts, the defendant in the instant action. The child, Cathy, and its mother remained in the home of the maternal grandmother from 1978 to 1981. The child and mother remained there afer the plaintiff and his now deceased ex-wife separated. Mother and child moved down the street from the maternal grandmother sometime in 1981 and were in their own living arrangement through December 9,

1982, when the mother died. Even with their separate quarters the child stayed with the grandmother a substantial portion of each week. Temporary visitation reinstituted by the New Haven Court (Copetto, J.) during the pendency of the 1982 custody proceedings had the plaintiff father picking up and dropping off the child at the home of its maternal grandmother.

Plaintiff takes the position in the instant action that as the sole surviving parent of the child, the plaintiff's right to custody cannot be challenged by the defendant who, as a stranger, lacks standing. It is undisputed that plaintiff is the father, that the mother died on December 9, 1982 and that the father's parental rights have not been terminated. What is disputed is plaintiff's claim that he is a fit person to have custody and control of the child.

The case of Baram v. Schwartz, 151 Conn. 315 (1964) is directly in point on the question of whether Habeas Corpus supplies the proper means for determining the right of custody of a minor child. Holding that it does, the Baram Court goes on to state as part of its holding that the welfare of the child is the paramount consideration whether the controversy was between the parents or between a parent and a stranger. In Baram, the mother, the custodial parent had died and the father as the sole surviving parent sought to have the Connecticut Court enforce an ex parte Rhode Island order modifying the custody order after the mother had died. The modification purported to award the child's custody to his father. It was conceded in argument in that case, that the Plaintiff sought and obtained the modification as the surviving parent solely on a disclosure that his wife had died and without a determination as to what the

child's welfare dictated. The court concluded in Baram that the child's welfare required an award of custody to the defendant maternal uncle. "The effect of that judgment was that the child should continue an association with near relatives with whom he has had intimate contact for many years and in a home which promises comfort and attention in the only environment he has known, rather than to separate him from all the contacts he has had since infancy in order to place him in unproven surroudings to be cared for by a father known to him only through infrequent visits and who over the years has been delinquent in his support." at 319-320.

In the instant case, following his divorce and remarriage, Plaintiff exercised visitation rights on a fairly regular basis. Visitation has however been problematic for the child.

On at least two separate occasions, Cathy was brought home from visitation so ill that she had to be hospitalized, once in June of 1981 for two weeks, another time in March of 1981, for one week. On one of these occasions plaintiff claimed the child had a temperature when he picked her up. He stated he took Cathy to his second wife's doctor the following day after she had bad vomiting fits. He claimed the doctor, whose name he did not know, would not treat the child because the plaintiff did not have the child's welfare medical card and because plaintiff was not the custodial parent. Even though the doctor told the plaintiff the child should be treated, the plaintiff did not contact the mother; instead, he took the child home and gave her aspirin. The next day, a Sunday, plaintiff took the child to his in-law's place at the beach. Once there she began vomiting again and running a high temperature. In response to

this he cut his visit short and dropped the child off at her grandmother's at noontime, leaving it to the grandmother and mother to see to the child's condition.

On the other occasion when the child became ill during visitation, plaintiff sought no medical attention at all, merely dropping the child of at its grandmother's with a high temperature. On each of these occasions the plaintiff failed to act appropriately in the face of very apparent and serious symptoms. Plaintiff's wife testified as to each of these occasions that there was nothing wrong with the child when she was dropped off. She testified that the reason Cathy was returned to her grandmother's home at noon on the first of these occasions was that she and the plaintiff had to be somewhere that afternoon.

The presence of bruise marks on both of Cathy's arms were observed by a police officer and State Department of Children and Youth Services worker, following the April 18, 1982 visit with her father. The bruises were described by them as finger marks on the flesh. The child had been grabbed hard enough to leave hand imprints on the arms. These marks were noticed by the grandmother the evening of April 18, 1982, the evening of the same day Cathy had come back from visitation with her father. The child was taken to the police who in turn upon seeing the bruise marks referred the case to the Department of Children and Youth Services (DCYS) as a suspected child abuse incident. A DCYS worker visited the family, met with the child and observed the bruise marks. When asked about the marks the child told the DCYS worker that her father had done it. Since the custody action was pending in the New Haven Court and since the

father was not the custodial parent, DCYS did not go further with their investigation and thus made no contact with the father.

When asked about the aforesaid bruises the plaintiff testified that he had grabbed Cathy to keep her from falling off a bus. According to the plaintiff, he and his wife and Cathy had gone to the unemployment office that afternoon because he had to report in. On their return, while alighting from the bus, Cathy going first and he behind her, he stated Cathy had started to fall and he grabbed her. Plaintiff gave the time of the incident as between 5 and 5:30 p.m. He described Cathy as having on a camel coat. When plaintiff's wife Lila McGaffin was asked about the bruises, she testified her husband had grabbed the child to keep her from falling off the bus. She stated her car was on the fritz that day and they had gone by bus that morning to the unemployment office. She described Cathy as wearing a green windbreaker and asserted that she was not wearing a camel coat. She further asserted the time of the incident was in the morning and not in the afternoon. Mrs. McGaffin had been sequestered during the testimony of her husband.

In response to the question put to him as to how visitations went, the plaintiff described Cathy as being nervous at first. He stated she comes into the apartment and sits on the couch until she is relaxed enough to play with her toys. Plaintiff states he keeps toys and clothes for her at his apartment but does not allow her to take them home because he claimed they got taken away from her. Plaintiff's wife when asked whether Cathy was nervous when she visited, testified that she was not, that as soon as Cathy got to the apartment she would sit in the middle

of the floor and watch television. Both plaintiff and his wife stated Cathy got along well with them on her visits and that there were no problems with her.

The maternal grandmother and two maternal aunts describe Cathy as being very fretful and upset the day before she knows she is to visit her father and as crying before she gets picked up.

Cathy herself in response to questions put to her by both plaintiff and defense counsel in chambers told the court that she did not like visiting with her father. When asked how she feels about her father she stated "not good". When asked why she felt that way about him she replied "he hurt me" and when asked how, stated he had grabbed her by the arms. When asked about the plaintiff's wife Lila McGaffin, Cathy stated Lila had slapped her. When asked what her father does when she tells him she does not feel well, Cathy responded "he tells me to take a nap". When asked how she feels about her grandmother, Cathy responded "good". Cathy makes it very clear that she wants to live with the grandmother.

Cathy came across in chambers as a poised articulate little girl. She understood what she was being asked and was not hesitant at all in giving her response. Present in chambers were counsel for the defendant and the plaintiff, the court reporter and the court clerk. The "in chambers" session was held at the request of both attorneys who were allowed to question the child directly. Her responses were constantly negative as to her father and his wife and positive as to her grandmother. What was particularly impressive about this child was that she was in a

room with strangers, neither the plaintiff nor the defendant were present and not once did she get fearful or teary. She sat up, put her candy down, looked straight at the person questioning her and answered. This is a child, under 5 years of age, who had lost her mother less than 4 weeks before.

Defendant argues that a four year old child is not competent to decide where it should live. We do not agree with that unqualified assertion. Cathy alone pled her case more eloquently than anyone else could. She looked well cared for, she sounded well cared for, she acted well cared for. She was telling us that she should stay with her grandmother, where she is happy, and feels good and where she wants to be. She wants to stay where she has been for most of her young life, with her grandmother.

The court must weigh this against the wishes of her father who comes across as a parent asserting his rights but as having failed to demonstrate that he could be a responsible, reliable caretaker. The court has noted particularly the discrepancies in the accounts given by the plaintiff and his wife as to how they perceived the child's health needs, how she got the bruise marks, how she interacted with them and responded to them. Plaintiff admits to being delinquent in his support payments. Lila McGaffin herself was quoted by one witness as having stated she didn't want to take care of children including Cathy.

The court cannot justify removing this child from what is and has been her a nurturing environment, where she has in addition to her grandmother an extended family of her deceased mother's siblings who have been a part of her

life since birth. She has already lost one mother. She should not at this tender age have to endure the loss of another.

We do not, however, feel that she should not maintain contact with her father and to this end will provide for visitation. The courts visitation orders however will be more limited as to overnights since we are not satisfied that the child should have to deal with the amount of overnight visitation in place prior to her mother's death. The child was not bearing up well under it nor were the plaintiff and his wife.

It is the judgment of this court that the defendant, Cathy Roberts, have custody of the minor child Cathy McGaffin.

The plaintiff shall have visitation rights as follows: One day per week from 10:00 a.m. to 5:00 p.m., on alternating Saturdays and Sundays except that on the first weekend of each month visitation shall be from 10:00 a.m. Saturday to 5:00 p.m. on Sunday. Visitation is to begin on Saturday, February 12, 1983.

/s/ M. Hennessey, J.

Judgment entered in accordance with the foregoing Memorandum of Decision.

/s/ Michael Kokoszka
Chief Clerk

NO. 11976	:	SUPREME COURT
WILLIAM MCGAFFIN	:	FROM THE J.D. OF MIDDLESEX
VS.	:	AT HARTFORD
CATHY ROBERTS	:	JULY 2, 1984

ORDER RE: MOTION TO REARGUE

The Motion to Reargue having been presented to this court, it is hereby: DENIED.

s/s
Chief Clerk
Supreme Court

WILLIAM MCGAFFIN *v.* CATHY ROBERTS
(11976)

SPEZIALE, C. J., HEALEY, PARSKEY, SHEA and GRILLO, Js.

The plaintiff father sought, by way of a habeas corpus action, to obtain custody of his four year old daughter following the death of her mother, his divorced wife. The trial court awarded custody to the defendant, the child's maternal grandmother, with whom the child had been residing at the time of the action. On the plaintiff's appeal to this court, *held:*

1. The defendant grandmother, having been made a party by the plaintiff, had standing to "resist" his habeas corpus petition.
2. There was no merit to the plaintiff's claim that the trial court erred in its interpretation of *Baram* v. *Schwartz* (151 Conn. 315), which that court cited as authority for the proposition that habeas corpus was the proper means for determining the right to custody of the minor child here; in that case, this court stated that "[t]he writ of habeas corpus has long been recognized as a proper means of determining the right to the custody of a minor child, and the welfare of the child is the paramount consideration, whether the controversy is between the parents or between a parent and a stranger."
3. The plaintiff's claim that, as the surviving biological parent, he was, by statute (§ 45-43), entitled to a presumption of parental fitness was unavailing since § 45-43, which provides that in the event of the death of either of a child's parents the survivor shall become that child's sole guardian, must, in light of a further statutory (§ 45-42b) provision, be construed in the child's best interests.

(One judge dissenting)

4. In applying the "best interests of the child" standard deciding the issue of custody, the trial court did not act in derogation of any of the plaintiff's constitutional rights.
5. The plaintiff's claim that the trial court erred in its legal conclusion based on its finding of facts in its memorandum of decision was unavailing.

Argued January 12—decision released June 19, 1984

Action for a writ of habeas corpus for the custody of a minor child, brought to the Superior Court in the judicial district of Middlesex, where the defendant filed a motion for custody of the minor child; the issues were tried to the court, *M. Hennessey, J.*, which denied the plaintiff's writ of habeas corpus and granted custody of the minor child to the defendant, from which the plaintiff appealed to this court. *No error.*

Daniel V. Presnick, for the appellant (plaintiff).

Peter M. Sipples, with whom, on the brief, were *David J. Peska* and *Lynda B. Munro,* for the appellee (defendant).

ARTHUR H. HEALEY, J. This appeal involves a habeas corpus action instituted by the plaintiff, William McGaffin (father), to obtain custody of Cathy McGaffin (child), his four year old daughter, after the death of Lena McGaffin (mother), the child's mother who was the plaintiff's divorced wife. The habeas corpus was brought against the defendant, Cathy Roberts, the maternal grandmother (grandmother), who contested the action and requested that she be awarded custody. The trial court, after a full hearing, awarded custody to the grandmother with rights of visitation in the father as specified in its memorandum of decision. This appeal followed.

Among the facts found by the trial court are the following: The child was born on January 7, 1978. Her father and mother were separated in 1980 and divorced in 1981. At the time of the divorce, both parents agreed that the mother be awarded custody of the child. In awarding custody to the mother, the dissolution court also ordered that the father pay $25 per week for the support of the child. The father remarried shortly after the divorce.

The mother died suddenly on December 9, 1982, in Clinton where she and the child had made their own living arrangement since sometime in 1981. Prior to that, the father, mother and child had come up from Virginia in 1978 and moved into the grandmother's home. The mother and child remained at that home after the mother's separation from the father until sometime in 1981 when they moved down the street from the grandmother. Although they then lived in separate quarters, the child spent a substantial portion of each week with the grandmother.

At the time of the mother's death, a custody action, instituted by the father, was pending in the New Haven judicial district because the mother had withheld visitation after she had found bruises on the child following a weekend visit with the father. Temporary visitation had been reinstated by that court during the pendency of that custody action during which the father picked up and dropped off the child at the grandmother's home. Prior to the mother's death, she and her child had been receiving state welfare assistance and the state was investigating the father for delinquent support payments.

The trial court also found that the father exercised visitation rights " on a fairly regular basis" after his divorce and remarriage although visitation "[had] . . . been problematic for the child." It found that on at least two occasions the child returned from visitation so ill that she had to be hospitalized, once in March, 1981, for one week and again in June, 1981, for two weeks.[1] On one of these occasions, the father claimed that the child had a temperature when he picked her up and that the next day he took her to his present wife's physician after she had "bad vomiting fits." The father maintained that although the physician told him that the

[1] The trial court admitted as full exhibits the hospital records of these two hospitalizations.

child should be treated, the physician would not do so because the father was not the custodial parent and did not have the child's welfare medical card. The father did not contact the mother but, instead, took the child home and gave her aspirin. On the following day, a Sunday, he took the child to the beach place of his present wife's parents where the child again began vomiting and running a high temperature. He thereupon cut his visit short and dropped the child off at her grandmother's at noontime. On the other occasion, the child became ill during visitation. The father did not seek any medical attention but merely dropped the child off at her grandmother's with a high temperature.

The trial court found that on each of these occasions the father "failed to act appropriately in the face of very apparent and serious symptoms." It also noted that the father's present wife testified that there was nothing wrong with the child when she was returned to the grandmother's house. The trial court's memorandum also develops the incident of the bruise marks found on the child's arms by the grandmother after her return on April 18, 1982, from visitation with her father. The father's explanation of the bruise marks was that he had grabbed the child to keep her from falling off a bus from which he, his present wife and the child were alighting.[2] These bruises, which were on both arms, were observed by both a police officer to whom the child was taken and a worker with the department of children and youth services (DCYS) to whom the Clinton police had referred the matter as a suspected child abuse incident.[3] The child told the DCYS worker that her father had inflicted the bruises. Both the Clin-

[2] Both the father and his present wife testified concerning this "bus incident." In pointing out certain inconsistencies in their testimony concerning the incident, the trial court's memorandum points out that the present Mrs. McGaffin was sequestered during the testimony of her husband.

[3] The trial court pointed out that since the custody action was pending in the New Haven judicial district and the father was not the custodial par-

ton police officer and the DCYS worker described the bruise marks as finger marks in the flesh. The trial court found that the child had been grabbed hard enough to leave handprints on the arms.

The father, in describing his visitation, stated that the child would be nervous when she first arrived, but thereafter she would relax and play with toys he kept for her. On the other hand, the present Mrs. McGaffin said that the child was not nervous on her visits. Both agreed that the child "got along well with them on her visits and that there were no problems with her." At the trial, the grandmother and two maternal aunts described the child "as being very fretful and upset the day before she knows she is to visit her father and as crying before she gets picked up."

Additionally, the trial court pointed out that an "in chambers" session was held at the request of the attorneys who were allowed to question the child directly.[4] The trial court found that she was "a poised articulate little girl" who "understood what she was being asked and was not hesitant at all in giving her responses." The court also found that "[h]er responses were constantly negative as to her father and his wife and positive as to her grandmother." When asked why she said she felt "not good" about her father, she replied, "he hurt me" and when asked how, she said that he grabbed her by the arms. On the other hand, when asked how she felt about her grandmother, she answered, "good." In sum, the court opined that the child "makes it very clear that she wants to live with the grandmother." In this connection, the trial court pointed out that "[s]he looked well cared for, she sounded well cared for [and]

ent, the department of children and youth services went no further with their investigation and made no contact with the father.

[4] Present in chambers were counsel for the father and the grandmother, the court reporter and the court clerk; neither the father nor the grandmother was present.

she acted well cared for" and that "[s]he wants to stay where she has been for most of her young life, with her grandmother."

The position of the father at the habeas hearing was that as the sole surviving parent of the child his right to custody could not be challenged by the grandmother, who, as a stranger, lacks standing. The trial court states that while it is not disputed that the plaintiff is the father, that the mother died on December 9, 1982, and that the father's parental rights have not been terminated, what is in dispute is the father's claim "that he is a fit person to have custody and control of the child." After examining the evidence, including that given by the child as well as its own observations,[5] the trial court decided that it "must weigh this against the wishes of her father who comes across as a parent asserting his rights but as having failed to demonstrate that he could be a responsible, reliable caretaker." Here the court points out that it has "noted particularly the discrepancies in the accounts given by the plaintiff and his wife as to how they perceived the child's health needs, how she got the bruise marks [and] how she interacted with them and responded to them." The father's delinquency in the support payments was noted as well as the attribution to his present wife that she did not want to take care of children including his child. The trial court concluded that it could not justify removing the child from the grandmother and therefore granted custody to the grandmother.

In appealing from the judgment granting custody, the father has set out and briefed twenty-two claims

[5] We have said that the trial court "may properly take into consideration the subjective characteristics of a person which are involved in the issues of a case like this . . . ." *Claffey* v. *Claffey*, 135 Conn. 374, 376, 64 A.2d 540 (1949); *Dadio* v. *Dadio*, 123 Conn. 88, 192 A. 557 (1937).

of error.[6] After careful scrutiny of all of the father's claims of error, justice will be served by the consideration of certain claims of error.[7] They are that the trial court erred in: (1) holding that the grandmother had standing to "resist" the father's habeas corpus petition; (2) its interpretation of *Baram* v. *Schwartz,* 151

[6] We are constrained to comment upon the potential for meaningful appellate review of a number of the father's claims. Certain of the claims require reference to a transcript of the relevant proceedings. These include claims going to the admissibility and the consideration of certain evidence when due to a lack of transcript, we do not know whether any or all of them were properly preserved for appellate review. Practice Book §§ 3060F, 3060V. Moreover, the father's brief does not contain a single citation to a transcript although his brief makes assertions that require such references under our practice. See Practice Book § 3060F. Further, he assigns as error the ruling of *Harrigan, J.*, "requiring" the transfer of this case from the New Haven judicial district to the Middlesex judicial district. He does this despite the fact that his present counsel, who was also trial counsel, admitted before us that he stipulated to that transfer. Groundless assignments of error are not to be countenanced. See *Scribner* v. *O'Brien, Inc.*, 169 Conn. 389, 392 n.1, 363 A.2d 160 (1975). Moreover, there is no question that under the habeas corpus statute, venue was properly in the Middlesex judicial district because the child in question was alleged to be in the custody and control of her grandmother in the town of Clinton in that judicial district. See General Statutes § 45-42.

The father also claims error in the trial court's failure to appoint counsel for the child and in not ordering a family relations report before entering a final order. The grandmother's brief maintains that she, not the father, did in fact file such motions, but that the father "chose" not to have those motions heard. While we are aware that the court may act on such motions sua sponte, the grandmother's claims in this connection that the father did not seek action by the court here have not been answered. The father also claims in his brief that the court erred in not granting him "immediate visitation privileges." The grandmother counters that this was not requested anywhere in the papers filed in this case and that the lack of a transcript prevents the father from claiming in this court that he did so orally below. No answer has been forthcoming to this argument of the grandmother. The father also claims that the court erred in failing "to take notice of the felonious conduct and unclean hands of Cathy Roberts [the grandmother]." This issue is really no more than mentioned in the father's brief; briefing to assure appellate review requires more than that. It is sufficient to note that we have examined all the father's claims. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Cole,* 189 Conn. 518, 538, 457 A.2d 656 (1983).

[7] The claims of error we consider implicate others which we do not specifically set out.

Conn. 315, 197 A.2d 334 (1964); (3) failing to give the father the benefit of the presumption of parental fitness; (4) its interpretation of General Statutes § 45-43;[8] (5) deciding the case solely on the basis of "the best interest of the child" without regard to the father's constitutionally protected parental rights; and (6) its legal conclusion based on its finding of facts as set out in its memorandum.

There can be no lingering doubts that the family unit, including the rights of parent and child, is accorded constitutional protection. "The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer* v. *Nebraska,* [262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 (1923)], the Equal Protection Clause of the Fourteenth Amendment, *Skinner* v. *Oklahoma,* [316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942)] . . . ." *Stanley* v. *Illinois,* 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972); see *Armstrong* v. *Manzo,* 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965); *Meyer* v. *Nebraska,* 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); *Pierce* v. *Society of Sisters,* 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925). As it noted recently, the United States Supreme Court has now "recognized on numerous occasions that the relationship between parent and child is constitutionally protected." *Quilloin* v. *Walcott,* 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511, reh. denied, 435 U.S. 918, 98 S. Ct. 1477, 55 L. Ed. 2d 511 (1978); see *Santosky* v. *Kramer,* 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). "[A] father, no less than a mother, has a constitutionally protected right to the 'compan-

[8] General Statutes § 45-43, entitled "Father and mother joint guardians," provides: "The father and mother of every minor child are joint guardians of the person of the minor, and the powers, rights and duties of the father and the mother in regard to the minor shall be equal. If either father or mother dies or is removed as guardian, the other parent of the minor child shall become the sole guardian of the person of the minor."

ionship, care, custody, and management' of 'the children he has sired and raised, [which] undeniably warrants deference and, absent a powerful countervailing interest, protection.' *Stanley* v. *Illinois,* 405 U.S. 645, 651 [92 S. Ct. 1208, 31 L. Ed. 2d 551] (1972)." *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 652, 95 S. Ct. 1225, 43 L. Ed. 2d 514 (1975). Parental rights are not, however, beyond limitation in the public interest. *Prince* v. *Massachusetts,* 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944). The United States Supreme Court has stated that "biological relationships are not [the] exclusive determina[nts] of the existence of a family." *Smith* v. *Organization of Foster Families,* 431 U.S. 816, 843, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977). One court puts it this way: "[T]he function of parenthood is not purely a matter of biology. Persons other than natural parents may occupy the relationship of parent to the child." *In re Palmer,* 81 Wash. 2d 604, 607, 503 P.2d 464 (1972). A state's constitutional interest extends to the welfare of the child. *Davis* v. *Smith,* 266 Ark. 112, 118, 583 S.W.2d 37 (1979); *In re William L.,* 477 Pa. 322, 336–39, 383 A.2d 1228 (1978).

We now turn to the father's claims of error. Initially, the father claims that the grandmother does not have standing[9] to "resist" his habeas corpus petition. He

[9] The father filed a special defense alleging that the grandmother lacked standing "to raise any claims for possession" of the child in the Superior Court and that her "sole remedy concerning this matter is to petition the court of probate in Branford to litigate her allegations." As we point out, the Superior Court has jurisdiction in a habeas corpus matter to determine child custody. We do not question the jurisdiction of a court of probate to determine child custody in a proper case. In the case before us, however, the habeas corpus action in the Superior Court was instituted by the service of process upon the grandmother on December 14, 1982. "In Connecticut, an action is commenced on the date of service of the writ upon the defendant. *Broderick* v. *Jackman,* 167 Conn. 96, 99, 355 A.2d 234 [1974]; *Seaboard Burner Corporation* v. *DeLong,* 145 Conn. 300, 303, 141 A.2d 642 [1958]; *Consolidated Motor Lines, Inc.* v. *M & M Transportation Co.,* 128 Conn. 107, 109, 20 A.2d 621 [1941]; *Spalding* v. *Butts,* 6 Conn. 28, 30 [1825]; *Jencks* v. *Phelps,* 4 Conn. 149 [1821]; *Clark* v. *Helms,* 1 Root 486

claims in his brief that mere physical possession of the child, unaccompanied by any other right to the child, cannot confer standing upon her where she might not otherwise have a legal right to petition for custody. He goes on and argues that we should not create a rule that naked possession with no other right to the child is sufficient to allow "an individual to defend or resist a habeas petition." He also claims that the trial court erred in its interpretation of *Baram* v. *Schwartz*, supra. We do not agree.

The defendant grandmother does have standing to "resist" the father's petition if for no other reason than that she is the target of the petition. The father cannot overlook the facts that he made her that target, that the *only* purpose served by the application for the writ is to secure the issuance of the writ in the discretion of the court and that "[t]he issues on which any subsequent trial is held are framed by the return and the pleadings subsequent thereto." *Adamsen* v. *Adamsen*, 151 Conn. 172, 176, 195 A.2d 418 (1963). Having made the grandmother a party, the father cannot claim that she is in no position to "resist" his petition. Black defines "resist" to mean "oppose" and "defend" to mean "[t]o oppose, repel or resist" as well as "[t]o contest and endeavor to defeat a claim or demand made against one in a court of justice." Black's Law Dictionary (5th Ed. 1979). Moreover, despite his claims under

[1793]." *Valley Cable Vision, Inc.* v. *Public Utilities Commission*, 175 Conn. 30, 33–34, 392 A.2d 485 (1978). The grandmother appears to have filed a petitition in the Clinton Probate Court sometime between December 15, 1982, and December 20, 1982, for the removal of the father as guardian of the person of the child under General Statutes § 45-43. That application sought the appointment of the grandmother as guardian of the person of the child. The Superior Court habeas corpus action was obviously instituted first. Because that court had jurisdiction to entertain and determine the question of custody, there is, under the circumstances, no merit to the father's claim that the relief sought by the grandmother is to be obtained solely in a court of probate. See *Don* v. *Frankel*, 136 Conn. 411, 71 A.2d 713 (1950).

General Statutes § 45-43, the time-honored function of habeas corpus in child custody cases with the ultimate question of what is in the best interests of the child militates against any such claim. The petitioner's reliance on § 45-43 strangely does not refer at all to the statutory scheme which, as we develop below, demonstrates that the legislature specifically provided that § 45-43 is a statute which "shall be liberally construed in the best interests of any minor child affected . . . ."[10]

The father also claims that the trial court erred in its interpretation of *Baram* v. *Schwartz,* supra, which it cited in the memorandum of decision as authority for the proposition that habeas corpus is the proper means for determining the right to custody of the minor child in this case. This claim is without merit. In *Baram,* we said that "[t]he writ of habeas corpus has long been recognized as a proper means of determining the right to the custody of a minor child, and the welfare of the child is the paramount consideration, whether the controversy is between the parents or between a parent and a stranger. *Antedomenico* v. *Antedomenico,* 142 Conn. 558, 562, 115 A.2d 659 [1955]; *Pfeiffer* v. *Pfeiffer,* [99 Conn. 154, 157, 121 A. 174 (1923)]." *Baram* v. *Schwartz,* supra, 318–19.

We further explicated the use of habeas corpus in child custody matters in *Pi* v. *Delta,* 175 Conn. 527, 530, 400 A.2d 709 (1978): " 'The use of habeas corpus to obtain custody was established at an early date . . . . When so used, the issue is not the illegality of confinement, as is normally the case, but rather what is best for the child.' 2 Stephenson, Conn. Civ. Proc. § 259 (a)

[10] General Statutes § 45-42b, entitled "Provisions construed in the best interest[s] of minor child," provides: "(a) The provisions of sections 45-42 to 45-45g, inclusive, shall be liberally construed in the best interests of any minor child affected by them.

"(b) All proceedings held under sections 45-42 to 45-45g, inclusive, shall, in the best interests of the minor child, be held without unreasonable delay."

p. 1063; *Kearney* v. *State,* 174 Conn. 244, 249, 386 A.2d 223 [1978]. A minor child is in the position of a ward of the state; *Howarth* v. *Northcott,* 152 Conn. 460, 464, 208 A.2d 540 [1965]; and '[t]he jurisdiction exercised by the court rests on its inherent equitable powers and exerts the force of the state, as parens patria[e], for the protection of its infant ward. *LaBella* v. *LaBella,* 134 Conn. 312, 316, 57 A.2d 627 [1948].' *Howarth* v. *Northcott,* supra, 464–65; *Doe* v. *Doe,* supra, 342–43 [163 Conn. 340, 342–43, 307 A.2d 166 (1972)]." In *Howarth,* we said that "[t]he very nature and scope of the inquiry [into what is best for the welfare of the child] and the result sought to be accomplished call for the exercise of the jurisdiction of a court of equity. In an equitable action the court endeavors to do complete justice. . . . 'Equity never does anything by halves.' " *Howarth* v. *Northcott,* 152 Conn. 460, 465, 208 A.2d 540 (1965).

Moreover, there is also statutory authority permitting a grandmother to intervene in a habeas corpus child custody controversy. General Statutes § 46b-57[11] permits such intervention of "any interested third party . . . upon motion . . ." and provides that the court, in making any order thereunder, "shall be guided by the best interests of the child . . . ."

[11] General Statutes § 46b-57, entitled "Third party intervention re custody of minor children. Preference of child," provides: "In any controversy before the superior court as to the custody of minor children, and on any complaint under this chapter or section 46b-1 or 51-348a, if there is any minor child of either or both parties, the court if it has jurisdiction under the provisions of chapter 815o, may allow any interested third party or parties to intervene upon motion. The court may award full or partial custody, care, education and visitation rights of such child to any such third party upon such conditions and limitations as it deems equitable. Before allowing any intervention, the court may appoint counsel for the child or children pursuant to the provisions of section 46b-54. In making any order under this section the court shall be guided by the best interests of the child, giving consideration to the wishes of the child if he is of sufficient age and capable of forming an intelligent preference."

The father next claims that the trial court erred in failing to give him the presumption of "parental fitness." As that claim implicates his claim that the court erred not only in its interpretation of General Statutes § 45-43, but also in deciding the case solely on the basis of the best interests of the child without regard for his constitutionally protected parental rights, we will consider all these claims together.

The father argues that as the surviving biological parent he was entitled to the presumption of parental fitness under General Statutes § 45-43,[12] which marks him as "a fit and proper parent" unless or until a third party disproves this fact. The trial court's memorandum of decision, he claims, however, clearly required *him* to establish that he was a fit and proper parent. In support of his claim that the trial court decided the case solely in the best interests of the child without regard to his constitutionally protected rights, the father makes the astonishing statement that "[t]here is a constitutional right which mandates that custody of a child be given to a biological parent" referring to *Santosky* v. *Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). *Santosky*, unlike this custody case, was a termination of parental rights case and, in any event, is hardly authority for the father's unusual statement in this case.

First, with reference to his presumption of parental fitness under § 45-43, he depends upon his biological nexus with the child. We cannot accept this claim. As we have already said, the genetic connection is not determinative of the issue of the best interests of the child although it is certainly a factor. Additionally, the fact that he is the sole surviving parent whose parental rights have not been terminated hardly makes inevitable his entitlement to custody in this habeas

[12] See footnote 8, supra.

corpus proceeding. This latter circumstance, however, is a significant consideration on the issue of custody. We remain unconvinced that it is a "presumption" as that term is commonly referred to in our law. Rather, we view it as an expression of the natural importance of parenthood as a factor in the determination what is in the best interests of the child.

In considering this claim of "presumption" as that term is referenced in our law; see, e.g., *Johnson* v. *Connecticut Co.*, 85 Conn. 438, 440–41, 83 A. 530 (1912), and cases there cited; we must remember that in this case the issue is not that of termination of parental rights but one of custody. This difference in the issues is a difference in kind and not in degree. This is so because of the substantial difference in the mandated result in each instance, i.e., the termination of parental rights which is final versus the award of custody which is modifiable. Compare *Hao Thi Popp* v. *Lucas*, 182 Conn. 545, 438 A.2d 755 (1980), with *Baram* v. *Schwartz*, supra, and *Claffey* v. *Claffey*, 135 Conn. 374, 64 A.2d 540 (1949). Acknowledging the natural importance of parenthood as we have, we must recognize that § 45-43 is under the explicit "best interest" mandate of § 45-42b.[13] Thus, the factor of parenthood is to be properly considered in the aggregate of all those circumstances that a trial court is entitled to consider in exercising its broad discretion in deciding what is in the best interests of a minor child. Section 45-42b is a clear legislative recognition that any formulation which focuses *entirely* on the respective rights of the contesting parties has no real part in this statutory

[13] General Statutes § 45-42b entitled "Provisions construed in best interest[s] of minor child" provides in part: "(b) All proceedings held under sections 45-42 to 45-45g, inclusive, shall, in the best interests of the minor child, be held without unreasonable delay."

In that regard, the record discloses that the original habeas petition was filed in the trial court on December 15, 1982, and that judgment was rendered on January 26, 1983.

scheme since the crucial issue is the best interest of the child. The constitutional concerns are not entirely parental because the preservation of family integrity "encompasses the reciprocal rights of both parent[s] and children." *Duchesne* v. *Sugarman,* 566 F.2d 817, 825 (2d Cir. 1977).

The father would have us view his claim to custody solely under that language contained in § 45-43. In doing so, he does not refer to § 45-42b which immediately precedes § 45-43 and expressly provides: "(a) The provisions of section 45-42 to 45-45g, inclusive, *shall be liberally construed in the best interests of any minor child affected by them . . . .*" (Emphasis added.) This statute was enacted quite some time after § 45-43. This subsequent legislative act throws light on the legislative intent of an earlier related act. *Baker* v. *Norwalk,* 152 Conn. 312, 317, 206 A.2d 428 (1965); see, *Bisi* v. *American Automobile Ins. Co.,* 137 Conn. 424, 431, 78 A.2d 533 (1951). Even if it were claimed that it merely codified an equitable principle that existed prior to its passage; *General Realty Improvement Co.* v. *New Haven,* 133 Conn. 238, 242, 50 A.2d 59 (1946); and articulated the authority which the court had under its general equitable powers, it is an unambiguous declaration of legislative intent and an acknowledgement of the standard to be used on the issue of custody even where the surviving biological parent claims entitlement to custody of the person of his minor child under § 45-43. We need hardly say here that "[i]t is ancient [and yet enduring] wisdom that statutes should be interpreted so as to effectuate their manifested purpose or object." 2A Sutherland, Statutory Construction (4th Ed. Sands) § 58.06, p. 474.

Further, we also cannot accept the father's claim that the trial court clearly required him to establish that he was a fit and proper parent. In the trial court's lengthy memorandum of decision there are two statements

upon which this claim appears to be based. We find that these statements are clearly interrelated. First, after pointing out that it was not disputed that the father was the surviving parent of the child and that his parental rights had not been terminated, the trial court said that "[w]hat is disputed is [his] claim that he is a fit person to have custody and control . . . ." Second, after a thorough discussion of facts found on which the trial court had obviously resolved conflicts in the evidence in favor of the grandmother's claim to custody, the memorandum contains this statement: "The court must weigh this against the wishes of her father who comes across as a parent asserting his rights but as having failed to demonstrate that he could be a responsible, reliable caretaker." It then goes on to indicate certain conclusions that resulted in its award of custody to the grandmother with visitation rights to the father.

The memorandum of decision must be read as a whole to put these statements in fair context. We examine the trial court's memorandum of decision to understand better the basis of the court's decision and to determine the reasoning for the conclusion reached by the trial court. *Bierman* v. *Westport Planning and Zoning Commission,* 185 Conn. 135, 136–37, 440 A.2d 882 (1981), and cases there cited. An examination of the memorandum of decision discloses that the trial court fully considered the father's claim that "as the sole surviving parent . . . [his] right to custody cannot be challenged by the defendant . . . ." There is no doubt that the trial court understood and employed the "best interests" standard as the ultimate basis of its decision. As the court specifically said in its memorandum, it did "weigh" the evidence in favor of the grandmother's claim to custody as against the evidence which favored the father "asserting his rights." Recognizing the father's assertion of his rights, the trial court on

all the evidence applied the "best interests" standard and decided to award custody to the defendant grandmother. In doing so, it did not act in derogation of any of the father's constitutional rights which, as we have already pointed out, are not absolute.

Finally, the father claims that the trial court erred in its legal conclusion based on its finding of facts in its memorandum of decision. Here he argues that the factual determination of the court does not establish either that the best interests of the child required that custody be awarded to the grandmother or that she was a "better custodial parent." Further, he asserts that in "applying the correct legal standard to the factual determinations made by the court, even viewing all the evidence most favorable [sic] to the defendant, the conclusion is inescapable that the court must return the child to the biological father . . . ." We cannot accept this claim because, as we have already stated, the trial court applied the proper legal standard. Moreover, the validity of any claim that the trial court's decision is not supported by the evidence may be tested only by reference to the record together with the transcripts and exhibits filed in the case; see *Morningside Assn.* v. *Morningside Development, Inc.*, 172 Conn. 60, 63, 372 A.2d 141 (1976). The father has not filed a transcript of all the evidence; see Practice Book §§ 3060F, 3060V; and therefore we cannot properly review any such claim.

"On appeal, it is the function of this court to determine whether the decision of the trial court is clearly erroneous. See Practice Book, 1978, § 3060D. This involves a two part function: where the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision; where the factual basis of the court's decision is challenged we must determine

whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous." *Pandolphe's Auto Parts, Inc.* v. *Manchester,* 181 Conn. 217, 221–22, 435 A.2d 24 (1980). Measuring by this standard, we find no error in the trial court's decision.

There is no error.

In this opinion SPEZIALE, C. J., SHEA and GRILLO, Js., concurred.

PARSKEY, J., dissenting. Section 45-43 of the General Statutes provides for the joint guardianship in both parents of their minor child. It also provides that "[i]f either father or mother dies or is removed as guardian, the other parent of the minor child shall become the sole guardian of the person of the minor." The right to custody of a minor child is one of the principal attributes of guardianship of the person. *Miller* v. *Miller,* 158 Conn. 217, 220, 258 A.2d 89, cert. denied, 396 U.S. 940, 90 S. Ct. 374, 24 L. Ed. 2d 241 (1969); *Boardman* v. *Boardman,* 135 Conn. 124, 129, 62 A.2d 521 (1948). The majority takes passing notice of the statute and then concludes that in some fashion it has been swallowed up in the "best interest of the minor child" provisions of § 45-42b.[1] Although one may marvel at the dexterity with which this has been accomplished, the decisional gloss which has been placed on this statute will not countenance so convenient a disappearance.

[1] The fact that under § 45-42b "[t]he provisions of sections 45-42 to 45-45g, inclusive [are to] be liberally construed in the best interests of any minor child affected by them" does not mean that the language contained in these sections is to be ignored. For example, § 45-43a provides that any adult relative may apply to the probate court for the removal of a parent as guardian and § 45-44c authorizes the probate court to remove a parent as guardian where it is shown, inter alia, that he is unfit or that there is no ongoing parent-child relationship and that to allow further time to establish such relationship would be detrimental to the child's best interest. Does the

In all custody disputes, what is in the best interests of the child is the ultimate concern. General Statutes § 45-42b embodies that principle. In a dispute between a parent and a nonparent, however, this is the end of the analysis, not the beginning. The troublesome issue is, in the quest to determine what is in the best interests of the child, how do we honor the constitutional; *Quilloin* v. *Walcott,* 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511, reh. denied, 435 U.S. 918, 98 S. Ct. 1477, 55 L. Ed. 2d 511 (1978); *Stanley* v. *Illinois,* 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972); and statutory; General Statutes § 45-43; interests of the parent. The majority's response is to ignore them. In its view, the parent and the nonparent compete as equals, with the biological nexus treated as one of many factors to be considered in the determination of the best interests. In its rush to determine what is in the best interests of the child the majority unnecessarily sacrifices the rights of the parents. In my view we only need to resort to § 45-43 and the cases that have construed it to arrive at a result which harmonizes these competing interests.

It has long been the law in this state that prima facie the legal right to the custody of a minor child is in the surviving parent. *Kelsey* v. *Green,* 69 Conn. 291, 298, 37 A. 679 (1897). Although the welfare of the child must be the controlling consideration "where the controversy is not between the father and the mother, as it was not in this case, the [father] has a prior right to custody unless the circumstances are such that to give it to [him] would not be for the best interests of the child." *Claffey* v. *Claffey,* 146 Conn. 104, 109–10, 148 A.2d 140 (1959). General Statutes § 45-43 rein-

majority suggest that under the liberally construed best interests standard contained in § 45-42b a probate court would be authorized to remove a parent as guardian whenever the court found that such removal was in the best interests of the child without specifically finding the specified statutory predicate for such removal? I think not.

forces that priority by declaring that the surviving parent is the sole guardian of the minor child.

Therefore, to give the parent's priority its just due the burden must clearly fall on the nonparent to disprove this priority. This burden is a heavy one. The nonparent must do more than assert that it would be in the best interests of the child to live with the nonparent; she must prove that it would be detrimental to the best interests of the child to live with the parent. As we warned in *Antedomenico* v. *Antedomenico,* 142 Conn. 558, 563, 115 A.2d 659 (1955), it will not be enough for the nonparent to prove that she can provide a better standard of living for the child. Nor will it be enough for the nonparent to assert that it is in the best interests of the child to keep her in the present nurturing environment of the nonparent. The nonparent must prove that it would be detrimental to the child to take her out of that environment and place her with the parent.

Since, as the majority recognizes, this case implicates the parent's liberty interest, it requires a due process analysis. Due process is a flexible concept and calls for such procedural protections as the particular situation demands. *Morrissey* v. *Brewer,* 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). Whether a particular procedure comports with due process requires an analysis of the governmental and private interests that are affected. Identification of the specific dictates of due process generally requires consideration of three distinct factors. "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement

would entail." *Mathews* v. *Eldridge,* 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

The private interest affected, that of a surviving parent who is accorded a priority to custody by law, is compelling. See *Stanley* v. *Illinois,* supra. The risk of error from not giving that priority presumptive effect is substantial. For example, if the only issue before the court in a custody dispute between a parent and a stranger is the best interests of the child, how is one to know whether, in a given case, custody may not be awarded on the basis of who would be the better provider, the very basis we said could not be used in *Antedomenico*? The countervailing governmental interest, favoring considering the parent's interest as one factor among many, is comparatively slight, but even more important, would be more adequately served by a procedure which harmonized the best interests of the child standard with the policy declaration according the surviving parent sole guardianship of the person.

This case should be viewed not as an isolated occurrence but rather as a paradigm of problems faced by the children of divorce. Divorce is a traumatic event which shatters the relationship between husband and wife. It is not intended nor should it be encouraged to shatter the relationship between a noncustodial parent (in most cases the father) and child. Our society is based on the premise of a nuclear family unit. When that unit is destroyed a custodial choice must be made between the competing interests of the two parents. The noncustodial parent usually is relegated to the role of financial supporter and occasional visitor. Nevertheless, it is hoped that the relationship between noncustodial parent and child, though diminished, will be maintained. If the custodial parent dies and the noncustodial parent is a suitable custodian then there is no reason why he should not become such custodian. The purpose of § 45-43 is to give the noncustodial par-

ent one leg up in any custody dispute. In my view he should be awarded custody unless the nonparent can show that to award him custody would be detrimental to the child's best interests.

The trial court did not determine that the plaintiff father was an unfit parent. Nor did it determine that returning the child to her father would be detrimental to her best interests. What it did determine was that the father failed to demonstrate that he could be a responsible, reliable caretaker and that removing the child from the nurturing environment of her grandmother would cause the child to suffer a grievous loss. In so finding the trial court misapplied the law. If the test in a custody suit between a parent and a stranger or relative for whom the child has developed an attachment is to be solely determined by the effect on the child of her removal from her nurturing environment, then I am afraid that the award of custody in a dissolution proceeding to all intents and purposes will become a severance of the parental relationship between the child and the noncustodial parent. Because I believe that in awarding custody to the defendant the trial court misapplied the law, I would vacate the judgment and order a new trial.

Conservation Commission of the Town of Simsbury *v.* Edmund W. Price et al. (11769)

Peters, Healey, Parskey, Shea and Grillo, Js.

The plaintiff Simsbury conservation commission, claiming a violation of the Inland Wetlands and Watercourses Act (§§ 22a-36 through 22a-45), sought, inter alia, to enjoin the defendant property owners from continuing work on a certain dam repair project on their property. The defendants had not obtained a permit for the project and the commission had previously issued a cease and desist order directing them to stop work on it. The trial court granted the requested relief and the defendants appealed to this court. *Held:*

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No. 84-626

UNITED STATES SUPREME COURT

OCTOBER TERM 1984

WILLIAM MCGAFFIN, Petitioner

vs.

CATHY ROBERTS

ON WRIT OF CERTIORARI
FROM THE SUPREME COURT OF THE
STATE OF CONNECTICUT

BRIEF FOR RESPONDENT

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Record For
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The appendix referred to in this brief is that filed with the petition by the petitioner.

SUMMARY OF ARGUMENT

The respondent relies on five principals of law to show that the writ of certiorari should not be granted.

1. The first argument is that Rule 21g provides that the petition for the writ must show when in the proceedings the question of any violation of a federal rights was first raised, so as to show that the federal question was timely and properly raised as to give the court jurisdiction. The petition only mentions that appeal was taken to the Supreme Court of Connecticut on constitutional grounds. For this reason the writ should be denied.

2. The facts presented by the respondent are the correct facts.

There are some differences as to what language of the memorandum of the lower court meant. The brief sets out these differences and what the respondent thinks are the correct facts.

3. Respondent contends that this court has not set any standards as to what proof is necessary in this case. Some cases cited by the petitioner are claimed to have set such standards, but these cases are not in point.

4. Respondent contends that this court should not set any standards. There are thousands of state and federal cases which give guidelines for the determination of such cases. This is a mater which needs no further interference from the federal courts.

5. Even if this court does set standards the standards could not be stricter than those set in Santosky vs. Kramer, 455 US 745, 102 S Ct 1388, 71 L Ed 2d 599, a case between the state and a parent where the state was attempting to force a surrender of all parental rights, and not just custody. But even if the same standards were applied here the result of the case would not be changed because the proof here was strong, clear, concise and convincing, so the result of the case would be the same.

LIST OF AUTHORITIES

24 American Jurisprudence 2d 968
Armstrong vs. Manzo 380 US 545, 85 S Ct 1187, 14 L Ed 2d 62

Spaulding vs. Palmer 81 Wash. 2d 604 503 P 2d 464 (1977)

Stanley vs. Illinois 405 US 645, 92 S Ct 1208 31 L Ed 2d 551 (1972)

24 American Jurisprudence 2d 968 (1982)

Armstrong vs. Manzo 380 US 545, 85 S Ct 1187, 14 L Ed 2d 62 (1965)

Hutchinson vs. Hutchinson 649 P 2d 38 (Utah 1982)

Lane vs. Lane 446 A 2d 418 (Me 1982)

Popp vs. Lucas 182 Conn. 545 438 A 2d 755 (1980)

Santosky vs. Kramer 455 US 745, 102 S Ct 1388, 71 L Ed 2d 599 (1982)

Smith vs. Organization of Foster Families 431 US 816, 97 S Ct 2094 53 L Ed 2d 14 (1977)

STATEMENT OF THE CASE

Cathy Roberts, the defendant in the State Court action is referred to in this brief as the respondent.

Where no record of evidence in the divorce hearing has been furnished, the facts can only be determined by the decision of the lower court which is set out in the appendix.

Respondent sets out the facts as slightly different from those set out by the petitioner in his brief. These differences while small are important. In the first part of the argument petitioner gives the reasons why her statement of facts are correct.

Petitioner brought this action by a writ of habeas corpus in the Superior Court of Middlesex County, Connecticut. After a hearing that court awarded custody to the respondent with visitation rights to the petitioner. Appeal was to Supreme Court of Connecticut which affirmed.

Petitioner married Lena McGaffin, daughter of the respondent, prior to January 7, 1978 when Cathy McGaffin the child in question was born to them. In 1978 they came to Connecticut and moved in to the home of the respondent where the petitioner, respondent, Lena and the child all lived until 1980 when the petitioner and Lena separated. Lena and the child continued to live with the respondent until 1981, when Lena moved a short distance away. However, the child stayed with the

respondent a substantial portion of each week during this period. In 1981 Lena obtained a Connecticut divorce from the petitioner. Custody of the child was not contested, and was awarded to Lena, and the petitioner was ordered to pay $25 a week child support to Lena.

On December 9, 1982 Lena died. The child has remained with the respondent ever since. The petitioner has visited the child on a fairly regular basis. The petitioner admitted that he was delinquent in making support payments.

On at least two occasions the child visited the petitioner and when returned to the respondent was so ill that she had to be hospitalized, once for a week and once for two weeks. On one of these occasions petitioner stated that the child had a tem-

perature when he picked her up. The following day she vomited, and petitioner took her to his wife's doctor, whose name he did not know, and who refused to treat the child, but did tell the petitioner that the child needed medical attention. Petitioner then took the child to his home, gave her aspirin. The following day he took the child to a beach. The child then vomited again, and had a high temperature. Petitioner then took the child back to the mother. The child was then hospitalized for two weeks. On the other occasion the child had a high temperature. Petitioner did nothing about it, but returned the child to her mother. The child was hospitalized immediately thereafter for one week. On both occasions the petitioner's wife stated that there was nothing wrong

with the child, and that the child was returned early because she had other plans.

Bruise marks were observed on the child's arms by a police officer and a worker for the State Department of Children and Youth Services, and by the respondent on April 18, 1982 after the child was returned from a visit with the petitioner. The child told the worker that her father had made the marks. The petitioner stated that the marks were made when the child had started to fall off of a bus and that he had grabbed her to keep her from falling. He stated that it took place between 5:00 and 5:30 in the afternoon and that the child was wearing a camel coat. His wife testified that these events took place in the morning, and that the

child was wearing a green windbreaker and not a camel coat.

Petitioner testified that the child would be nervous at the beginning of a visit, but eventually would become at ease. His wife testified that she was not nervous.

There was testimony from the respondent and others that, prior to visitations with the petitioner, the child would be fretful and upset. The child without question liked the grandmother and did not like the petitioner nor his wife. She stated that the petitioner hurt her and that his wife slapped her. One witness stated that the wife did not want to take care of children including Cathy.

The trial court made a finding of fact as follows:

"The court must weigh this against the wishes of her father who comes across as a parent asserting his rights but as having failed to demonstrate that he could be a responsible, reliable caretaker."

JURISDICTION

The respondent agrees with the petitioner that if there is a federal constitutional question involved, that the court has jurisdiction under 28 U.S.C. Par. 2(d). Respondent denies that there is a federal constitutional problem. Rule 22 cited by petitioner as a basis for jurisdiction, has nothing to do with jurisdiction of this court; however, Rule 17, 19, 20 and 21 set out terms of jurisdiction.

Under any circumstances this court does not have jurisdiction

because the information required by Rule 21g has not been furnished.

QUESTION PRESENTED

Respondent denies that there is or should be a constitutional standard to be applied in custody disputes between a non-custodial father and a materal grandmother after the death of the child's mother. This is a faucet of law reserved to the states under the tenth amendment.

If however, the court decides that such a standard be set, the facts of this case show by clear and convincing evidence that the state court properly awarded custody to the grandmother, and if the court should see fit to grant the writ of certiorari, the only purpose thereof would be to clarify the law, but such a procedure could not affect the out-

come of the case and would be merely dictum.

Respondent also denies that the trial court adjudicated the petitioner to be a fit parent (see decision of trial judge in appendix).

STATUTE INVOLVED

Respondent admits that if there is a federal constitutional question involved it would arise as a result of the due process clause of the Fourteenth Amendment. Respondent contends that the equal protection of law clause and the Ninth Amendment have nothing to do with the problem.

ARGUMENT

1. This case is not properly before this court because Supreme Court Rule 21g has not been followed by the petitioner.

This rule sets out that in review of judgment of a state court the statement of the case should specify the stage in the proceedings "both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised----."

From what information we have the federal question was not raised in the lower Connecticut Court. Apparently the constitutional questions were just raised in the Supreme Court of Connecticut.

The statement of the case does not show when the federal question was raised, nor does it show how it was raised. Therefore, this court does not have jurisdiction over the case.

2. The facts presented by the respondent are the correct facts.

The petitioner did not see fit to present the court with the transcript of the hearing in the lower Connecticut Court. Therefore the facts must be taken as those found by the trial judge.

Petitioner states (petition page 3) that he had "a strong and loving relationship with his daughter." The finding of the trial judge indicates that this is not so (see appendix 8).

Petitioner was behind in his support payments. This does not indicate a "strong and loving relationship" (see appendix pages 2-9).

Petitioner states as a fact that he was adjudicated "fit by the trial court" (petition, page 3). This is not true and is not supported by anything in the record. The trial

court held that he was not a "responsible, reliable caretaker". (appendix page 7) True the trial judge did not use the words "not a fit father," but certainly this is what he meant. No exact words are necessary.

3. No constitutional standards have been promulgated by this court to state the degree of proof necessary to give custody to a grandmother as against a father of a child.

This court has held many times that parents have rights in their children which must be recognized.

Stanley vs. Illinois 405 US 645, 92 S Ct 120B, 31 L Ed 21d 551 (1972)

Armstrong vs. Manzo 380 US 545, 85 S Ct 1187, 14 L Ed 2d 62 (1965)

Smith vs. Organization of Foster Families 431 US 816, 97 S Ct 2094, 53 L Ed 2d 14 (1977)

The cases setting out this theory of law can be divided into different groups.

1. Where the action is to terminate parental rights.

2. Where the state is a party.

3. Where custody alone is involved.

As to the first group this court has required proof that the government or person alleging that parental rights should be terminated has the burden of proof, not only by a preponderance of the evidence, but by clear and convincing proof. The court went on to say that the best interest of the child was paramount, but the proof had to be stronger than a mere preponderance of the evidence. The court

did not require proof beyond a reasonable doubt. The court held that the correct standard was by clear and convincing proof. This decision was decided by a 5 to 4 margin with a strong dissent by Justice Rehnquist.

Santosky vs. Kramer 455 US 745, 102 S Ct 1388, 71 L Ed 599 (1982)

The same case discussed at length the advantage which the state had in being able to produce witnesses, especially if the parent was not endowed with riches. This part of the case distinquishes between cases where the state is one party. Based on the reasoning in this case there is always a stronger reason for having a higher standard of proof of the unfitness of the parent in either the first or second of the two groups.

The final group of cases is where only custody is to be awarded,

and where the contest is between two natural person. Termination of parental rights is determined only once, and cannot be re-examined at a later time as can a custody determination. Certainly of the three groups, the third would require a lesser degree of proof than either of the other two.

> Hutchinson vs. Hutchinson, 649 P 2d 38 (Utah 1982)

However, courts all over the country have stated over and over that the welfare of the child is the primary factor.

> Spaulding vs. Palmer 81 Wash. 2d 604, 503 P.2d 464 (1977)
>
> Lane vs. Lane 466 A 2d 418 (Me. 1982)
>
> "It has been recognized moreover, that even though a parent is fit to have custody, he may be denied custody if this is clearly inimical to the best interests of the child."

24 Am. Jur 2d 968 (1982)

4. The Proper Rule is that there is a Presumption that the parent is entitled to custody, but this presumption is rebuttable when it is for the best interest of the child to do so.

It appears at first blush there may be conflict between the cases and authority above and the recent cases which hold that there is a presumption in favor of a parent in awarding custody as a matter of constitutional right. Examples include:

Stanley vs. Ilinois, supra

Armstrong vs. Manzo, supra

Popp vs. Lucas 182 Conn. 545, 438 A 2d 755 (1980

However, petitioner contends that these cases fit together. Normally the child is better off with one or both of its parents unless

there are some circumstances which show that considering all factors, the child is better off to be in the custody of some other person.

> "As a natural parent the plaintiff is entitled to custody unless it is established that the child's welfare plainly requires otherwise."
>
> Popp vs. Lucas, supra 438 A 2d @ page 758

The old rule that the welfare of the child is paramount still holds good, but we must recognize the rights of the parent to have custody, and with these facts in mind, determine what is the best interest of the child. Considering the right of the parent to have custody, and the evidence presented at the trial together, the trial court was thoroughly justified in finding that it was for the best interest of the

child to have custody awarded to the respondent.

Note that Popp vs. Lucas, supra, was decided by the Supreme Court of Connecticut in 1980, and was cited by that court in the decision in this case on page 406. Obviously the Connecitcut Court had the ruling in Popp in mind in deciding this case.

Respondent suggested that the court pay special notice to the standards set out in Spaulding vs. Palmer, supra, 503 P.2d @ page 466, as to what factors the court should consider in rendering a custody decision, and particularly the fifth standard which recommends broad discretion be given to the trial court who saw and heard the witnesses, rather than only the printed

record. (Here we do not even have the printed record.)

Petitioner relies on Hutchinson vs. Hutchinson , supra as authority that the decision of the Supreme Court of Connecticut is at odds with the Utah decision. Actually the Utah court sent the case back on the grounds that the trial judge had not made a specific finding of fact and law according to the Utah Rules of Court. In the case at bar the lower court made a lengthy memorandum of the facts and the law on which he relied. The Utah court set out standards which the trial should use in determining custody, but these standards are the ordinary standards that every law student learns in a domestic relations course. Nowhere in the decision does the Utah court mention the United States

Constitution or the Utah Constitution. Furthermore, everything the court said on this issue was dictum because it was decided on the basis of the rule.

5. Regardless of any standards the court might see fit to adopt, the facts of this case are strong enough in favor of the respondent, so that the result could not be changed.

This court should deny the writ. If another case arises were it is necessary to determine standards to see if the constitutional rights of the father were violated, they should then be determined, but not in this case in which the determination of standards would not affect the result.

Santosky vs. Kramer, supra, does establish standards of proof (clear and convincing evidence) necessary to

deprive a parent of his constitutional right to an interest in the child in a suit brought by the state where parental rights were to be terminated. Surely this court would never set a higher standard of proof in a case between a father and a grandmother where only custody is in question.

If the court does not see fit to set standards, the decision of the trial judge certainly should be upheld (Spaulding vs. Palmer, supra). If the court thinks that standards should be set, than the standards should be less rigid than those established in Santosky vs. Kramer, supra. But even using the Santosky standards, the case should not be overturned. The evidence is strong, clear and convincing that the child would not be well cared for by the

father. The following facts show this:

1. The new wife of the petitioner does not want to take care of the child.

2. The petitioner is behind in his support payments without explanation.

3. Visitation rights were not regularly exercised, but were only exercised on a fairly regular basis.

4. On two occasions when the child visited the petitioner, the child was sick, and proper medical care was not provided, and the child had to be hospitalized once for one week and once for two weeks on return to the mother. The petitioner was informed by a doctor that the child needed medical attention, but the petitioner did nothing about it.

5. The child was abused by the father and had fingermarks on her arms. The explanation of this episode given by the petitioner and his wife do not coincide and indicate that both explanations were fabricated.

6. The child herself has indicated a strong dislike to visit the petitioner.

7. The child herself has indicated a strong desire to live with her grandmother.

8. The child has lived with the grandmother almost all of her life, and has been substantially cared for by the grandmother for all of her life.

Surely no one could reasonably say that the proof that the child should stay with the grandmother is not clear and convincing. Again

respondent re-iterates that the decision of the trial judge should not be overturned unless there was no convincing proof that his decision was correct. Here all of the evidence supports his finding.

Assuming that the above reasoning is correct if the writ is granted, the final decision would not be changed. Respondent would be put to expense, worry and trouble for no avail to anyone.

CONCLUSION

The writ of certiorai should not be granted for the following reasons:

1. Case should be dismissed because Rule 21g has not been lived up to.

2. There are no cases in this court which set out standards of

proof between persons on custody matters.

3. There is no reason to establish such standards and each case should be handled on its own merits.

4. The constitutional right of a parent to company etc. of his child is subject to the welfare of the child, which is paramount in custody cases.

5. If the court decides that standards are necessary in a case such as this, such standards should not be established in this case because the result of the case would not be changed.

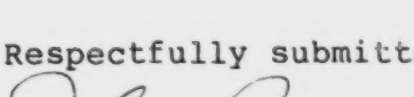
6. If such standards were established they would probably be less strict than in the Santosky case, and in any event the respon-

dent has lived up to whatever standards of proof would be required.

Therefore the writ should not be granted.

DATED: February 19, 1985

Respectfully submitted,



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